In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 812

UNITED STATES, PETITIONER

v.

THE DISTRICT COURT IN AND FOR WATER DIVISION NO. 5, STATE OF COLORADO, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

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413-471—71——1

[Supreme Court, State of Colorado, Certified To Be a Full, True, and Correct Copy, Dec. 8, 1970, Richard D. Turelli, Clerk of the Supreme Court (Court Seal) By Richard D. Smith, Deputy Clerk]

THE UNITED STATES OF AMERICA

v.

THE DISTRICT COURT IN AND FOR WATER DIVISION NO. 5, STATE OF COLORADO AND THE JUDGE THEREOF, THE HONORABLE CLIFFORD H. DARROW, AND THE WATER REFEREE THEREOF

Relevant Docket Entries

ORIGINAL PROCEEDING

1970	Docketed: July 2, 1970
July 2	Application for Writ in the Nature of Prohibition filed.
July 9	Above application denied.
	Closed July 24, 1970, List Full
Nov. 16	Copy of order of U.S. Supreme Court Granting a stay of proceedings in Water Division No. 5 filed.

Application for Writ in the Nature of Prohibition

[Supreme Court, State of Colorado, Certified To Be a Full, True, and Contract Copy, Dec. 8, 1970, Richard D. Turelli, Clerk of the Supreme Court (Court Seal) By Evelyn J. Olive, Deputy Clerk]

[Filed in the Supreme Court of the State of Colorado, Jul. 2, 1970, Richard D. Turelli]

No. 24821

In the Supreme Court of the State of Colorado

THE UNITED STATES OF AMERICA

v.

THE DISTRICT COURT IN AND FOR WATER DIVISION No. 5, STATE OF COLORADO AND THE JUDGE THEREOF, THE HONORABLE CLIFFORD H. DARROW, AND THE WATER REFEREE THEREOF

Application for Writ in the Nature of Prohibition

The United States of America by its undersigned attorneys, United States Attorney James L. Treece, Assistant Attorney General Shiro Kashiwa, Assistant Chief, Appellate Section, Edmund B. Clark, Assistant United States Attorney Leonard W. D. Campbell, and Attorney, Department of Justice Robert H. Whaley, PRAYS that an alternative Writ in the Nature of Prohibition issue out of this Court to the District Court in and for Water Division No. 5, State of Colorado and the Judge thereof, the Honorable Clifford H. Darrow, and the Water Referee thereof, prohibiting said Court, Judge and Referee from asserting jurisdiction over the United States, from adjudicating any water rights of the United States or from purporting to bind the United States in In the Matter of the Applications for Water Rights, Changes for Water Rights, Etc., Filed in Said Court for the Months of December, 1969, and January, 1970, Case No. Misc. § 1, for the reason that said Court and Judge are wholly without jurisdiction over the United States. The grounds for this application and the circumstances out of which it arose are as follows:

(1) On February 11, 1970, the Attorney General received by mail a paper signed by the water clerk of Water Division No. 5 directed to "All persons interested in Water Applications filed in said Water Division No. 5." The paper first notified the reader that "The following is a resume of all applications filed in the Office of the Water Clerk during the month of December, 1969." There followed a list of water right applications giving brief descriptions of the water use, means of water use, and applicant. The paper concluded with a statement that "You

are further notified that you have until the last day of March, 1970 to file with the water clerk a verified statement of opposition to any such applications, if you desire to oppose any such applications." Similar papers have been received listing applications filed during the months of January, February, March, April and May. A copy of the December resume is attached hereto.

(2) The mailing of the resume was purportedly for the purpose of fulfilling the service requirements of 43 U.S.C. Section 666 (66 Stat. 560, known as the McCarren Amendment) whereby the United States has consented to be joined as a defendant in certain general water adjudications.

(3) In response to the receipt of the December, 1969, resume, the United States filed with the Water Court of Water Division No. 5 a Motion to Quash Service challenging the jurisdiction of the court over the United States on the grounds that:

(a) The proceedings based on said applications do not constitute the kind of water right adjudication suit with respect to which the United States has consented to be sued.

(b) The purported "service" of the said resume does not constitute "service of process" within the meaning and contemplation of 43 U.S.C. § 666.

(4) In support of the Motion to Quash, the United States filed a Memorandum of Points and Authorities, a copy of which is attached hereto.

(5) The Motion to Quash was heard before Judge Clifford H. Darrow on April 9, 1970.

(6) In an opinion dated April 21, 1970, the Motion to Quash was overruled by Judge Darrow. A copy of the opinion is attached hereto.

(7) For the reasons summarized in the Motion to Quash and in the Memorandum of Points and Authorities submitted herewith, the proceedings before the Water Referee in Water Division No. 5 are not proceedings to which the United States has consented to be sued under 43 U.S.C. § 666 or any other statute and, therefore, said Water Referee, Water Court, and Judge cannot lawfully attempt to assert jurisdiction over the United States.

(8) The pending Water Referee proceedings in Water Division No. 5 purports to require the United States to make monthly voluntary appearances to protest new water right

applications upon penalty of losing all protection afforded to its water uses as affected by the water uses for which a water right application has been filed.

(9) There is no provision in the water referee proceeding for a general adjudication of all water rights of the water uses on a stream system wherein the water uses of the United States may be determined *inter sese* with all other water uses.

(10) That purporting to join the United States to a proceeding wherein, when served, it can only appear in the posture of filing a statement in opposition to other applications, attempts to bind the United States to a decree confirming other water uses without simultaneously determining *inter sese* the water rights of the United States, thereby attempting to deny recognition of the water rights of the United States.

(11) That the receipt of resumes for Water Divisions Nos. 4, 5 and 6 for water referee proceedings indicates that an attempt is being made to bind the United States in proceedings wherein its rights are not considered or recognized,

(12) There is pending in the United States Supreme Court a Writ of Certiorari to review the decision rendered by this Court in *The United States of America* v. *The District Court in and for the County of Eagle and State of Colorado, and the Judge Thereof, The Honorable William H. Luby,* in which the type of proceeding to which the United States has consented to be joined under 43 U.S.C. § 666 will be considered. It is appropriate that this Court prohibit the Water Court of Division No. 5 from attempting to exercise jurisdiction over the United States until the United States Supreme Court has considered the above question.

Wherefore, the petitioner, the United States of America, prays this Honorable Court:

(1) To take original jurisdiction in the matters thus presented to it.

(2) To issue an order commanding the respondent Court, Judge, and Water Referee to show cause why they, and each of them, should not be prohibited from asserting or attempting to assert jurisdiction over the United States in the pending water referee proceedings.

(3) To issue an order prohibiting the respondents, said Judge and Court and Referee from asserting or attempting to assert

jurisdiction over the United States in the pending water referee proceedings.

James L. Treece
JAMES L. TREECE,
United States Attorney,

Shiro Kashiwa
SHIRO KASHIWA,
Assistant Attorney General,

Edmund B. Clark
EDMUND B. CLARK,
Assistant Chief,
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Leonard Campbell
LEONARD W. D. CAMPBELL,
Assistant United States Attorney,

Robert H. Whaley
ROBERT H. WHALEY,
Attorney,
Department of Justice, Washington, D.C.

July 1970.

CERTIFICATE OF SERVICE

I certify that copies of the foregoing Application for Writ in the Nature of Prohibition have been served upon Kenneth Balcomb, Esquire, Delaney and Balcomb, Glenwood Springs, Colorado, Attorneys for The Colorado River Water Conservation District; Alvin L. Steinmark, Esquire, Miller, Steinmark, Ruyle and Shade, P.O. Box 749, Greeley, Colorado, Attorneys for Central Colorado Water Conservancy District; and John L. Kane, Jr., Esquire, Lakewood, Colorado, Attorney for Blue River Irrigation Company, by placing copies of same in the United States mail, postage prepaid, properly addressed, on this 1st day of July, 1970.

Robert H. Whaley
ROBERT H. WHALEY.

No. ——

In the Supreme Court of the State of Colorado

THE UNITED STATES OF AMERICA

v.

THE DISTRICT COURT IN AND FOR WATER DIVISION NO. 5, STATE OF COLORADO AND THE JUDGE THEREOF, THE HONORABLE CLIFFORD H. DARROW, AND THE WATER REFEREE THEREOF

Receipt

The receipt of a copy of the Application for Writ in the Nature of Prohibition of the United States of America in the Supreme Court of the State of Colorado is hereby acknowledged by the undersigned Judge of the Water Court for Water Division No. 5, State of Colorado.

Signed this 1st day of July, 1970.

CLIFFORD H. DARROW,
Water Judge,
Water Division No. 5, State of Colorado.

[Received General Litigation Section; Apr. 27, 11:50 a.m., 1970, and and Natural Resources Division, Department of Justice]

In the District Court in and for Water Division No. 5, State of Colorado

Case No. Misc. No. 1

IN THE MATTER OF THE APPLICATION FOR WATER RIGHTS, CHANGES FOR WATER RIGHTS, ETC., FILED IN SAID COURT FOR THE MONTHS OF DECEMBER, 1969, AND JANUARY, 1970

Order

Appearances on the Motion to Quash:

Mr. James L. Treece, United States Attorney, Mr. Leonard W. D. Campbell, Assistant United States Attorney, Mr. David A. Osborne, Assistant United States Attorney, United States Courthouse, Denver, Colorado. Mr. Robert H. Whaley, Attorney, Department of Justice, Washington, D.C., Attorneys for Movant.

Messrs. Delaney and Balcomb, Mr. Kenneth Balcomb, Glenwood Springs, Colorado, Attorneys for The Colorado River Water Conservation District.

Messrs. Miller, Steinmark, Ruyle and Shade, Mr. Alvin L. Steinmark, P.O. Box 749, Greeley, Colorado, Attorneys for Central Colorado Water Conservancy District.

Mr. John L. Kane, Jr., Lakewood, Colorado, Attorney for Blue River Irrigation Company.

This matter came on for hearing and argument before the Court on the 9th day of April, 1970, upon the motion of the United States to quash service. Appearances were as noted on the title and venue page of this Order.

At the conclusion of the hearing, the matter was submitted for consideration and ruling by the Court.

The grounds of the Government's motion are two:

(1) The proceedings based on said applications do not constitute the kind of water rights adjudication suit with respect to which the United States has consented to be sued.

(2) The purported "service" of the résumé does not constitute "service of process" within the meaning and contemplation of 43 U.S.C. Sec. 666 [McCarran amendment].

I

The first ground of the motion has been ruled upon adversely to the Government by the Colorado Supreme Court in an original proceeding. See: The United States of America v. District Court of Eagle County (The Colorado River Water Conservation District, City and County of Denver, Central Colorado Water Conservancy District, and the New Jersey Zinc Company, Intervenors), —— Colo. —— (1969), 458 P. 2d 760.

Certiorari has been issued by the Supreme Court of the United States to the Colorado Supreme Court in that case for a review of its order discharging the rule to show cause why a writ of prohibition should not be issued to the trial court which had ruled that the United States was amenable to its jurisdiction in a supplemental general water adjudication being conducted under the Water Act which has since been superseded (except as to pending proceedings thereunder), by a new and different law known as the Water Rights Determination and Administration Act of 1969, under which these instant proceedings are pending.

The prohibition proceeding in the Colorado Supreme Court was heard and ruled upon under the earlier water law (C.R.S. 1963, 148–9–7).

In our opinion, the *ratio decidendi* of the Colorado Supreme Court is equally applicable to proceedings for which provision is made by the 1969 Act as concerns the Government's contention stated in sub-division (1) of the motion to quash. Perhaps to greater degree, because the jurisdiction of the Court for Water Division No. 5 extends to a much larger area than the former water district which is involved in the case on certiorari and which is now included within Water Division No. 5.

II

The second ground of the Government's motion states that the 1969 Act is inadequate in that service of the resume does not meet the requirements of "service" within the meaning of the McCarran amendment. 43 U.S.C. Section 666 provides in pertinent part:

> (b) Service of Summons. *Summons or other process* shall be served upon the Attorney General or his designated representative. [Emphasis supplied.]

Rule 4(d)(4) of the Federal Rules of Civil Procedure provides:

> (b) * * * When, under Rule 4(e) * * * service is made pursuant to a statute or rule of court of a state, the summons, or notice, or order in lieu of summons shall correspond as nearly as may be to that required by the statute or rule. * * *

A resume is a notice. Service of the resume is a procedural matter. Everyone (including the United States) receives the kind and length of notice to which he is entitled when served in conformity with state, and when applicable, federal statutes.

III

It might be said that there should be a present suspension of a ruling by this Court upon the motion to quash, inasmuch as the disposition of the original proceeding in the Colorado Supreme Court has been challenged in the highest Court in the land.

We are bound by and must follow, however, the rule of decision as enunciated by the highest Court of this state, while also being bound by the Supremacy Clause of the United States Constitution.[1] When we consider the waiver of immunity created in 43 U.S.C. 666, we do not find in the matter before this Court any conflict with the Supremacy Clause of the Constitution of the United States.

We shall treat the Colorado Water Rights and Determination Act of 1969, as a matter of local concern in which federal sovereign immunity has no place, unless and until the higher Courts of Colorado, or the federal jurisdiction, shall hold otherwise.

For the reasons stated, we must overrule the motion to quash.

It is so ordered.

The Court will entertain, where appropriate, applications by the United States for reasonable extensions of time.

Done at Chambers in the City of Glenwood Springs, Colorado, this 21st day of April, 1970.

CLIFFORD H. DARROW, *Water Judge,*
Water Division No. 5, State of Colorado.

Exceptions are preserved of record.

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[1] Article VI.

* * * * * * *

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

In the District Court in and for Water Division No. 5, State of Colorado

Case No. ——

IN THE MATTER OF THE APPLICATIONS FOR WATER RIGHTS FILED IN SAID COURT FOR THE MONTHS OF DECEMBER, 1969 AND JANUARY, 1970

Memorandum of Points and Authorities in Support of Motion To Quash Service

On February 4, 1970, the Attorney General received by mail a paper signed by the water clerk of Water Division No. 5 directed to "All Persons Interested In Water Applications Filed in Said Water Division No. 5." The paper first notified the reader that "The following is a resume of all applications filed in the Office of the Water Clerk during the month of December, 1969." There followed a list of water right applications giving brief descriptions of the water use, means of use, and applicant. The paper concluded with a statement that "You are further notified that you have until the last day of March, 1970, to file with the water clerk a verified statement of opposition to any such applications, if you desire to oppose any such applications." A similar paper listing the applications filed during the month of January was also received. On the face of it, it is apparent that such a paper does not constitute summons or other process within the meaning of 43 U.S.C. 666 nor does it describe proceedings with respect to which the United States has consented to be joined as a defendant.

I. THE UNITED STATES HAS NOT CONSENTED TO SUIT IN THIS TYPE OF PROCEEDING

The United States cannot be sued without its consent and Congress alone can give such consent. *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941); *Dalehite* v. *United States*, 346 U.S. 15, 30 (1933). Congress has given consent to join the United States as a defendant in certain suits involving the adjudication and administration of water rights. This consent is contained in 43 U.S.C. 666:

(a) *Joinder of United States as Defendant; Costs.* Consent is given to join the United States as a defend-

ant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under state law, by purchase, by exchange or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit.

(b) *Service of Summons.* Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.

From the language of the statute and the cases construing the statute, it is apparent that the United States has not consented to suit in all matters involving water rights, but only in suits which meet certain conditions.

The federal courts which have construed the consent to suit provisions of 43 U.S.C. 666 have concluded that Congress intended to waive the sovereign immunity of the United States only in proceedings commonly known as "general adjudications." *Dugan* v. *Rank*, 372 U.S. 609 (1962); *State* v. *Rank*, 293 F. 2d 340 (C.A. 9, 1961); *Miller* v. *Jennings*, 243 F. 2d 157 (C.A. 5, 1957); *Nevada* v. *United States*, 279 F. 2d 699 (C.A. 9, 1960); see also *City of Chino* v. *Superior Court of Orange County*, 255 C.A. 2d 747, 63 Cal. Rptr. 532 (1967). The meaning of the term "general adjudication" as applied to 43 U.S.C. 666 can readily be determined by reference to the legislative history and the above cases construing 43 U.S.C. 666.

The Supreme Court in *Dugan* v. *Rank*, *supra*, interpreted the consent to suit provisions of 43 U.S.C. 666 to be limited to "general adjudications."

> It is sufficient to say that the provisions of the McCarran amendment, 66 Stat. 560, 43 U.S.C. § 666 [footnote omitted], relied upon by respondents and providing that the United States may be joined in suits "for the adjudication of rights to the use of water of a river system or other source," is not applicable here. Rather than a case involving a *general* adjudication of "all of the rights of various owners on a given stream," S. Rep. No. 755, 82d Cong., 1st Sess. 9 (1951), it is a private suit to determine water rights solely between the respondents and the United States and the local Reclamation Bureau officials. In addition to the fact that all of the claimants to water rights along the river are not made parties, no relief is either asked or granted as between claimants, nor are priorities sought to be established as to appropriative and proscriptive rights asserted." [372 U.S. at 618.]

In its opinion, the Supreme Court specifically stated that it agreed with the treatment of 43 U.S.C. 666 by the Ninth Circuit Court of Appeals in the case below, *State* v. *Rank*, *supra*, before it reached the Supreme Court. 372 U.S. at 617. In this regard, the Circuit Court stated:

> The question presented by the contention of the United States requires us to determine whether this suit can be regarded as one "for the adjudication of rights to the use of water of a river system" within the meaning of § 666.
>
> There can be little doubt as to the type of suit Congress had in mind. It was not a private dispute between certain water users as to their conflicting rights to the use of waters of a stream system; rather it was the quasi public proceeding which in the law of western waters is known as a "general adjudication" of a stream system: one in which the rights of all claimants on a stream system, as between themselves, are ascertained and officially stated. [293 F. 2d 340, 346–7.]

Both the Supreme Court and the Court of Appeals referred to the Senate Report on the bill as further clarification of what type suit Congress had in mind when it passed 43 U.S.C. 666. Both courts concluded that the consent of the United States

to be joined in certain suits for the adjudication of water rights extended only to suits where "all the rights of various owners on a given stream", S. Rep. No. 755, 82 Cong., 1st Sess. 9 (1951), are involved in the suit. It is revealing of the intent of Congress to note that the Senate Report on the bill referred to the language of the Supreme Court in *Pacific Live Stock Co.* v. *Oregon Water Board* (*Lewis*), 241 U.S. 447 (1915), in reference to the type proceeding in which the Committee thought the United States should be joined.

> * * * All claimants are required to appear and prove their claims; no one can refuse without forfeiting his claim, and all have the same relation to the proceeding. It is intended to be universal and to result in a complete ascertainment of all existing rights, to the end, first that the waters may be distributed, under public supervision, among the lawful claimants acccording to their respective rights without needless waste or controversy * * * [241 U.S. at 447–448; contained in S. Rep. 775, 82 Cong., 1st Sess. 9 (1951).]

In holding that 43 U.S.C. 666 did not consent to suit in a case alleged to be a general adjudication of water rights in the Santa Ana River system, the California Court of Appeals made reference to the precedure described in the *Pacific Live Stock Co.* case.

> It would be an idle act to question whether the Oregon statute under consideration in Pacific Live Stock Co. v. Lewis, 241 U.S. 440 [60 L.Ed. 1084, 36 S. Ct. 637], did indeed exemplify: "* * * the quasi-public proceeding which in the law of western waters is known as a 'general adjudication' of a stream system." It has been declared to be such, in the interpretation given by the courts of the United States to section 666 of title 43, U.S.C.A., by which we are bound. *City of Chino* v. *Superior Court of Orange County*, 255 C.A. 2d 747, 760 (1967).

The Fifth Circuit Court of Appeals in *Miller* v. *Jennings*, *supra*, found the consent to suit of the United States by 43 U.S.C. 666 restricted to suits where all the persons who have rights are before the court.

> The United States has not given its consent to be joined as a defendant in every suit involving water rights. It may be made a party only in suits "for the adjudication of rights to the use of water of a river system or other source." There can be an adjudication of rights with respect to the upper Rio Grande only in a proceeding where all persons who have rights are before the tribunal. The Ninth Circuit Court of Appeals has most succinctly stated the doctrine in this manner: "The only proper method of adjudicating the rights on a stream, whether riparian or appropriative or mixed, is to have all owners of lands on the watershed and all appropriators who use water from the stream involved in another watershed in court at the same time." *People of the State of California* v. *United States*, 9 Cir., 1956, 235 F. 2d 647, 663. See *Pacific Live Stock Co.* v. *Lewis*, 241 U.S. 440, 36 S. Ct. 637, 60 L. Ed. 1084. 243 F.2d at 159.

The essential elements of the proceedings to which the United States has consented to be joined as a defendant, as described by these cases as well as the legislative history of 43 U.S.C. 666, are that all the water users and all the water rights on a stream system be involved in the action before the court and all the rights of the parties be determined as between themselves. These elements constitute the essence of a "General Adjudication." The water referee proceeding does not constitute such a general adjudication of water rights because all the water users and all water rights on a stream system are not involved in the referee's determinations. The notice of the proceeding is directed only to those parties who may be "interested" in the water applications. The only water rights considered in the proceeding are those for which an application has been filed within a particular month. The only parties before the referee are those who have taken affirmative action to file for a water right or have determined that they "desire" to file a Statement in Opposition, and even those who have elected to participate are not afforded an opportunity to present their case in a judicial manner. In addition, the provisions of the Colorado statute, which make all surface water rights confirmed under the current procedure junior to those awarded in previous district adjudications, necessarily exclude those previously decreed water rights from the

consideration of the referee. As a result, the only rights before the referee are those which have arisen since the last water proceeding. Hence, the proceeding is a very limited one, administrative in nature, involving only a fractional part of the water rights and parties in the entire water division. It is evident from the foregoing, that when the Attorney General received notice of the referee proceeding, the proceeding did not constitute a general adjudication where all water rights of all parties were to be determined as between themselves. Congress and the courts have determined that the United States has consented to no less.

While the terms used by the Colorado Legislature to describe proceedings created by the Water Right Determination and Administration Act of 1969, are not determinative of the substantive nature of the proceeding according to federal law, it is significant to note that the Colorado Legislature has designated the bi-annual water right tabulation proceeding as a "General Adjudication," Colo. Rev. Stat. 148–21–28(k), and has not so characterized the water referee proceeding.

II. THE UNITED STATES IS NOT A NECESSARY PARTY TO THE PROCEEDINGS BEFORE THE WATER REFEREE

Among other things, the consent to suit of the United States in 43 U.S.C. 666 is limited to suits in which the United States is a necessary party. The statutory provisions creating the referee proceeding do not make any party a necessary party, but on the contrary, involve only those parties who voluntarily elect to participate. The mailed notice is addressed not to necessary parties but to parties "interested" in the water applications. Response to the water applications is made only in the event that one "desires" to file a Statement in Opposition. Nowhere in the statute can it be found that the referee proceeding will be defective if any party fails to file a Statement in Opposition. Appearance before the referee by any party other than the party seeking a water right is not required by the statute and the activity by the referee would be complete even when no party has filed a Statement in Opposition or other Application for Water Right. Hence, there are no necessary parties under the referee procedure and complete relief can be granted to the applicant without the appearance of any other party.

This proceeding stands in marked contrast to that which existed under the previous adjudication procedure (repealed by the Water Right Determination and Administration Act of 1969) where the notice required by the statute specifically recited the command of the statute that "all owners or claimants of any water right in the water district * * * file a statement of claim * * * and * * * appear at said time and place for the taking of evidence in regard to all water rights so owned or claimed by them." Colo. Rev. Stat. 148–9–5–(1)(a). The referee procedure is unique in that it does not require that any party come in and file his claim for a water right but only provides for the filing of oppositions by interested parties. In such a case the United States is certainly not a necessary party. As noted before, Congress waived the immunity from suit of the United States only in situations where all claimants to water rights on the stream were necessary to obtain a complete degree.

III. THE RÉSUMÉ OF APPLICATIONS FOR WATER RIGHTS FILED DURING THE MONTHS OF DECEMBER AND JANUARY MAILED TO THE ATTORNEY GENERAL DO NOT CONSTITUTE SERVICE OF "SUMMONS OR OTHER PROCESS" UNDER 43 U.S.C. 666

Because the water referee proceeding is not a suit for the adjudication of water rights within the meaning of 43 U.S.C. 666, the paper received by the Attorney General cannot constitute "summons or other process" under 43 U.S.C. 666.

Moreover, the language of 43 U.S.C. 666 requires that in order for the United States to be joined as a defendant in a suit of the type to which it has consented, it must be served with a summons or process which effects such joinder. However, the proceedings before the water referee under the Colorado Water Right Determination and Administration Act of 1969, do not contemplate the joinder of any party as a defendant and do not require personal service of process for jurisdiction. In fact no provision for personal service of process is contained in the statute and the statute states that the jurisdiction of the Water Court and referee over water matters is not contingent on personal service of process, Colo. Rev. Stat. § 148–21–20(3). Hence, receipt by the Attorney General of a résumé of water right applications filed, which apparently would not constitute "service of process" for jurisdictional purposes on

citizens of Colorado, cannot be so construed in regard to the United States.

Since the Colorado Legislature did not contemplate service of notice as a prerequisite to proceedings under the statute on the applications filed, it seems plain that such proceedings do not constitute the kind of proceedings contemplated by Section 666, with respect to which Congress considered service of process essential to the jurisdiction of the Court.

Respectfully submitted,

JAMES L. TREECE,
United States Attorney,

LEONARD W. D. CAMPBELL,
Assistant United States Attorney,
Robert H. Whaley,

ROBERT H. WHALEY,
Attorney,
Department of Justice,
Attorneys for defendant.

In the District Court In and For Water Division No. 5, State of Colorado

To: All Persons Interested in Water Applications in Said Water Division No. 5

Pursuant to C.R.S. 148–21–18, you are notified that the following is a resume of all applications filed in the office of the water clerk during the month of December, 1969.

The names and addresses of applicants, description of water rights or conditional water right involved, and description of ruling sought, are as follows:

1. Application No. W–1, is an application for water rights of Nettie O. Dodge, Granby, Colorado, in the Dodge Spring and Pipeline No. 2. The point of diversion is a spring box located at a point whence the E¼ corner of Section 35, Township 2 North, Range 77 West of the 6th P.M. bears N.29°16′E. a distance of 2,935.5 feet, taking water from a spring or seepage tributary to the Fraser River. Date of initiation of the appropriation: August 25, 1925. Use or proposed use of the water: domestic, irrigation and stock-watering. Amount of water claimed is .02 of a cubic foot per second.

2. Application No. W–2, is an application for water rights of Nettie O. Dodge, Granby, Colorado, in the Dodge Spring and Pipeline No. 1. The point of diversion is a spring box located at a point whence the E¼ corner of Section 35, Township 2 North, Range 77 West of the 6th P.M. bears N.53°07′E. a distance of 3,213 feet, taking water from a spring or seepage tributary to the Fraser River. Date of initiation of the appropriation: August 25, 1925. Use or proposed use of the water: Domestic, irrigation and stock-watering. Amount of water claimed is .02 of a cubic foot per second.

3. Application No. W–3, is an application for water rights of Robert D. Henry, Grand Lake, Colorado, in the Henry Ditch. The point of diversion is a headgate located at a point on the right bank of an unnamed creek, a tributrary of the North Fork of the Colorado River, whence the W¼ corner of Section 24, Township 4 North, Range 76 West of the 6th P.M., Grand County, Colorado bears N.49°55′W. for 743.21 feet. Use or proposed use of the water: irrigation purposes. Date of initiation of the appropriation: July 10, 1966. Amount of water claimed by diversion in cubic feet per second of time: 5.0.

4. Application No. W–4, is an application for water storage rights of Robert L. Busse and Elaine A. Busse in Grand Lake, Colorado, in the Busse Fish Pond No. 2. Amount of water claimed in acre feet: 9.86. Reservoir survey at high water line: beginning at a point whence the S¼ corner of Section 35, Township 4 North, Range 76 West of the 6th P.M. bears S. 58°-43′W. a distance of 654.69 feet; thence N.29°30′W. a distance of 183.00 feet; thence N.15°41′W. a distance of 242.00 feet; thence N.06°30′W. a distance of 75.00 feet; thence N.01°00′ W. a distance of 107.00 feet; thence N.70°00′E. a distance of 20.00 feet; thence S.21°00′E. a distance of 100.00 feet; thence S.04°-45′E. a distance of 73.00 feet; thence S.18°00′E. a distance of 150.00 feet; thence S.38°45′E. a distance of 98.00 feet; thence S.20°30′E. a distance of 180.00 feet, thence S.68°50′E. a distance of 74.26 feet to the point of beginning. Source of water: Busse Pickup Lateral No. 2, a tributary of the North Fork of the Colorado River. Proposed use of the water: fish culture purposes. Date of initiation of the appropriation: June 22, 1968. Date of approval of the reservoir by State Engineer: June 22, 1968. State Engineer No.: 23463.

5. Application No. W–5, is an application for water rights of Robert L. Busse and Elaine A. Busse in Grand Lake, Colo-

rado, in the Busse Pickup Lateral No. 2. The point of diversion is a headgate located at a point whence the NE corner of Section 35, Township 4 North, Range 76 West of the 6th P.M. bears N.33°00′E. a distance of 154.00 feet, taking water from an unnamed creek arising in Section 26, Township 4 North, Range 76 West, a tributary to the North Fork of the Colorado River. Date of initiation of the appropriation: June 30, 1968. Use or proposed use of the water: Irrigation and stock-watering. Amount of water claimed by diversion in cubic feet per second of time: 20.00.

6. Application No. W–6, is an application for water rights of Robert L. Busse and Elaine A. Busse in Grand Lake, Colorado, in the Busse Pickup Lateral No. 1, taking water from an unnamed creek arising in Section 26, Township 4 North, Range 76 West of the 6th P.M. which is tributary to the North Fork of the Colorado River, and the DeWitt Ditch. Date of initiation of the appropriation: July 1, 1963. Use or proposed use of the water: irrigation and stock-watering. Amount of water claimed by diversion in cubic feet per second of time: 20.00. The point of diversion or proposed diversion is a headgate located at a point whence the W.¼ corner of Section 25, Township 4 North, Range 76 West of the 6th P.M. bears West a distance of 645.00 feet.

7. Application No. W–7, is an application for water storage rights of Robert L. Busse and Elaine A. Busse in Grand Lake, Colorado, in Busse Fish Pond No. 1, taking water from seepage from North Fork of the Colorado River (off channel excavation). Legal description of reservoir survey at high water line: Beginning at a point whence the S.¼ corner of Section 35, Township 4 North, Range 76 West of the 6th P.M. bears S.65°02′W. for 796.96 feet; thence S.71°33′E. a distance of 100.00 feet; thence S.45°20′E. a distance of 96.00 feet; thence S.53°36′E. a distance of 174.00 feet; thence S.41°37′E. a distance of 123.00 feet; thence S.02°47′W. a distance of 84.13 feet; thence N.75°46′W. a distance of 147.00 feet; thence S.53°22′W. a distance of 182.00 feet; thence N.40°13′W. a distance of 100.00 feet; thence N.03°10′W. a distance of 348.00 feet to the point of beginning. Date of initiation of the appropriation: June 22, 1968. Date of approval of reservoir by State Engineer: February 13, 1969. State Engineer No.: 23463. Amount of water claimed in acre feet: 21.40. Proposed use of the water: fish culture purposes.

8. Application No. W–8, is an application for water rights of C Lazy U Ranch, Inc., in Granby, Colorado, in C Lazy U Spring No. 1, taking water from a spring or seepage tributary to the Colorado River. The point of diversion is a spring box located at a point whence the East ¼ corner of Section 15, Township 2 North, Range 77 West of the 6th P.M., Grand County, Colorado bears S.45°56′E. a distance of 2067.0 feet. Use or proposed use of the water: irrigation and stock-watering. Amount of water claimed by diversion in cubic feet per second of time: .02. Date of initiation of appropriation: July, 1925.

9. Application No. W–9, is an application for water rights of C Lazy U Ranch, Inc., Granby, Colorado, in the C Lazy U Spring No. 2. The point of diversion is a spring box located at a point whence the SW corner of Section 11, Township 2 North, Range 77 West of the 6th P.M., Grand County, Colorado, bears S.75°27′W. a distance of 887.0 feet, taking water from a spring or seepage tributary to the Colorado River. Amount of water claimed is .02 of a cubic foot per second. Use or proposed use of the water: Irrigation and stock-watering. Date of initiation of the appropriation: July, 1925.

10. Application No. W–10, is an application for water rights of C Lazy U Ranch, Inc., Granby, Colorado, in the C Lazy U Spring No. 3 and Pipeline, taking water from a spring or seepage tributary to Willow Creek, a tributary of the Colorado River. Use or proposed use of the water: domestic, irrigation and stock-watering. Amount of water claimed is .03 of a cubic foot per second. Date of initiation of the appropriation: July, 1920. The point of diversion is a spring box and pipeline intake at a point whence the N¼ corner of Section 11, Township 2 North, Range 77 West of the 6th P.M., Grand County, Colorado, bears N.37°23′E. a distance of 550.8 feet.

11. Application No. W–11, is an application for water storage rights of C Lazy U Ranch, Inc., Granby, Colorado, in the C Lazy U Fish Pond No. 2. The legal description of reservoir survey at high water line: beginning at a point whence the NE corner of Section 3, Township 2 North, Range 77 West of the 6th P.M. bears N.20°14′E. a distance of 2227.0 feet; thence N.87°20′W. a distance of 43.0 feet; thence N.52°55′W. a distance of 30.0 feet; thence S.88°05′W. a distance of 73.0 feet; thence N.82°25′W. a distance of 96.0 feet; thence S.60°45′W. a distance of 129.0 feet; thence S.48°25′W. a distance of 51.0 feet; thence S.46°05′E. a distance of 55.0 feet; thence S.42°50′E. a distance of 75.0 feet; thence S.40°10′E. a distance of 107.0 feet; thence

S.84°15′E. a distance of 85.0 feet; thence S.80°20′E. a distance of 47.0 feet; thence N.87°50′E. a distance of 78.0 feet; thence N.04°06′E. a distance of 256 feet to the place of beginning. Source of water: Spring run-off from adjacent lands and springs and seepages developed under said pond. Date of initiation of appropriation: August 1, 1956. Date of approval of reservoir by State Engineer: December 26, 1968. State Engineer No.: 23442. Amount of water claimed is 15.77 acre feet. Use of the water: Irrigation, recreation, fish culture, stock-watering and domestic uses.

12. Application No. W–12, is an application for change of water right of Straight Creek Corporation, Littleton, Colorado, in the Rankin No. 1 Ditch and the Rankin No. 2 Ditch, in Summit County. Present point of diversion: On the north side or right bank of Straight Creek, from which it derives its supply of water, whence the West ¼ corner of Section 5, Township 5 South, Range 77 West of the 6th P.M. bears North 84°36′ West 4759 feet. Amount and priority of diversion: Rankin No. 1 Ditch: 5.0 c.f.s. decreed to Priority No. 16, Water District No. 36; Rankin No. 2 Ditch: 1.25 c.f.s. decreed to Priority No. 20, Water District No. 36. The proposed change is from irrigation to irrigation, domestic, municipal and recreation purposes. Date of appropriation: Rankin No. 1 Ditch: May 18, 1883; Rankin No. 2 Ditch: June 1, 1883. Date of decree: March 2, 1910.

13. Application No. W–13, is an application for water right of Straight Creek Corporation, Littleton, Colorado, in the Rankin No. 3 Ditch in Summit County. The point of diversion is on the North side or right bank of Straight Creek, from which it derives its supply of water, whence the West quarter corner of Section 5, Township 5 South, Range 77 West of the 6th P.M., bears North 84°36′ West 4759 feet. Date of initiation of the appropriation: May 18, 1883. Amount of water claimed is 6.25 cubic feet per second. Use or proposed use of the water: Irrigation, municipal, domestic and recreation purposes.

14. Application No. W–15, is an application for water rights of The Superior Oil Company in Rio Blanco County, Colorado, in The Superior Oil Company Diversion and Storage Project. The address of the applicant is P.O. Box 1521, Houston, Texas.

A. THE SUPERIOR OIL COMPANY STORAGE SYSTEM:

1. The Superior Oil Company Storage System consists of four reservoirs and their respective filler pipelines:

a. Crooked Wash Reservoir: The left abutment is located at a point whence the SE corner of Section 35, Township 3 North, Range 98 West of the 6th P.M. bears S.61°-48′E., 2406 feet, taking water from the White River by pumping pipeline and Crooked Wash. Amount of water claimed is 11,800 acre feet, for which ruling is sought.

b. Wray Gulch Reservoir: The right abutment is located at a point whence corner No. 1 of Tract 48, Section 35, Township 2 North, Range 97 West of the 6th P.M. bears S.07°52′W., 718 feet, taking water from the White River by pumping pipeline and Wray Gulch. Amount of water claimed is 13,500 acre feet, for which ruling is sought.

c. Blacks Gulch Reservoir: The left abutment is located at a point whence the ¼ corner common to Section 32, Township 2 North, and to Section 5, Township 1 North, Range 96 West of the 6th P.M. bears S.68°11′W., 505 feet, taking water from the White River by pumping pipeline and Blacks Gulch. Amount of water claimed is 13,900 acre feet, for which ruling is sought.

d. Kellog Gulch Reservoir: The right abutment is located at a point whence corner No. 4 of Tract 45, Section 9, Township 1 North, Range 96 West of the 6th P.M. bears S.21°54′E., 717 feet, taking water from the White River by pumping pipeline and Kellog Gulch. Amount of water claimed is 3,700 acre feet, for which ruling is sought.

e. Crooked Wash Pipeline: The headgate is located at a point on the right bank of the White River, from which it derives its supply of water, whence the SE corner of Section 35, Township 3 North, Range 98 West of the 6th P.M. bears S.88°45′E., 3135 feet. Amount of water claimed by diversion is 100 c.f.s., for which ruling is sought.

f. Wray Gulch Pipeline: The headgate is located at a point on the right bank of the White River, from which it derives its supply of water, whence corner No. 1 of Tract 48, Section 35, Township 2 North, Range 97 West of the 6th P.M. bears N.53°45′W., 550 feet. Amount of water claimed by diversion is 100 c.f.s., for which ruling is sought.

g. Blacks Gulch Pipeline: The headgate is located at a point on the right bank of the White River, from which it derives its supply of water, whence the north ¼ corner of Section 5, Township 1 North, Range 96 West of the 6th P.M. bears N.15°45′E., 5120 feet. Amount of water claimed by diversion is 100 c.f.s., for which ruling is sought.

h. Kellog Gulch Pipeline: The headgate is located at a point on the right bank of the White River, from which it derives its supply of water, whence corner No. 4 of Tract 45, Section 9, Township 1 North, Range 96 West of the 6th P.M. bears No. 90°E., 1,075 feet. Amount of water claimed by diversion is 100 c.f.s., for which ruling is sought.

B. THE SUPERIOR OIL COMPANY PIPELINE & TERMINAL RESERVOIRS:

1. The Superior Oil Company Pipeline and Terminal Reservoirs headgate is located at a point on the left bank of the White River, from which it derives its supply of water, whence corner Number 3, Tract 40, Township 1 North, Range 97 West of the 6th P.M. bears S.51°52′52″E., 2,730.66 feet. Amount of water claimed by diversion is 12 c.f.s., for which ruling is sought. Two terminal, operational storage reservoirs are contemplated, with an aggregate capacity of 800 acre feet, for which ruling is sought. Date of initiation of the appropriation: Work was commenced by survey on the 14th day of May, 1968.

2. Proposed use of the water from The Superior Oil Company Diversion and Storage Project is for industrial, mining, power, irrigation, domestic, municipal, recreational, and other beneficial purposes.

15. Application No. W–16, is an application for water rights of The Superior Oil Company, P.O. Box 1521, Houston, Texas, in The Superior Oil Company Pumpback Pipelines No. 1 & No. 2, in Rio Blanco County. The headgate of Pumpback Pipeline No. 1 is located at a point whence the SW corner of Section 23, Township 2 N., Range 101 W. of the 6th P.M. bears N.43°-34′45″W., 1,516.64 feet; the headgate of Pumpback Pipeline No. 2 is located at a point whence the NE corner of Section 9, Township 1 N., Range 102 W. of the 6th P.M. bears N.87°04′-43″E., 1,981.95 feet. Source of water is the White River. Date of initiation of the appropriation: Work was commenced by survey on the 5th day of October, 1968. Amount of water claimed by diversion: Pumpback Pipeline No. 1: 12 c.f.s.; Pumpback Pipeline No. 2: 12 c.f.s. Use or proposed use of the water: Industrial, mining, power, irrigation, domestic, municipal, recreational, and other beneficial purposes.

16. Application No. W–17, is an application for water rights of The Superior Oil Company, P.O. Box 1521, Houston, Texas, in The Superior Oil Company Pumpback Pipeline No. 3, in

Rio Blanco County, taking water from the White River. The point of proposed diversion is a headgate located at a point whence the SW corner of Section 23, Township 2 N., Range 101W. of the 6th P.M. bears S.01°55'27"W. 2462.19 feet. Date of initiation of the appropriation: Work was commenced by survey on the 5th day of October, 1968. Amount of water claimed is 12 cubic feet per second. Use or proposed use of water: Industrial, mining, power, irrigation, domestic, municipal, recreation, and other beneficial purposes.

17. Application No. W–14. Name and address of applicants: Sohio Petroleum Company, The Oil Shale Corporation, and The Cleveland-Cliffs Iron Company, c/o Colony Development Operation, Atlantic Richfield Company, 1500 Security Life Bldg., 1616 Glenarm Place, Denver, Colo. 80202; Reese R. Inskeep and Roy H. Inskeep, DeBeque, Colo.

DESCRIPTION OF WATER RIGHT

The Larkin Ditch, to which the following decrees were heretofore entered:

A decree in an adjudication in Water District 42, on July 22, 1912, for 25 cubic feet per second for irrigation, with priority date of April 1, 1888, and a decree entered July 25, 1941, for 10.4 cubic feet, for domestic use during non-irrigation season, priority date of April 1, 1888.

RULING SOUGHT

Present point of diversion is on south bank of Colorado River, the source of supply, whence the SE corner of SW¼, Sec. 27, Twp. 8 S., R. 97 W. of the 6th P.M., Mesa County, Colorado, bears south 2°45'W. 2,830 feet.

The applicants seek an alternate point of diversion for the use of the water represented by stockholdings of the applicants in The Larkin Irrigation Company: 35 shares owned by the applicants (of the 90 shares of the capital stock of The Larkin Irrigation Company) and 5 shares (of the 90 shares) held under option by Sohio Petroleum Company. The alternate point of diversion will be at the intake of the Deer Park Gulch Pumping Pipeline, being at a pumping plant on the right bank of the Colorado River whence the Northwest corner of Sec. 21, Twp. 8 S., R. 97 W. of the 6th P.M. bears North 43°08' west a distance of

10,290 feet. The applicants seek to retain the Larkin Ditch as an additional point to divert water represented by their stock. Applicants also seek permission for a change of use of the water which will be diverted at the alternate point of diversion. The new uses will be industrial, mining, domestic, municipal, irrigation, recreational and other beneficial uses. In addition, applicants seek a change in place of use of the water to be diverted at the alternate point of diversion, such new places being at or near oil shale properties held by Sohio, Oil Shale Corp. and Cleveland-Cliffs in Twps. 5, 6 and 7 S., Ranges 95, 96, and 97 W. of the 6th P.M., Garfield County, Colorado. When the applicants are using the alternate point of diversion, they seek to divert water year around under the irrigation right, subject to any conditions which might be imposed to protect the rights of others, and only during the non-irrigation season under the domestic right. The changes sought in the application are only for interests in said water rights which are represented by the stock owned by or under option to applicants Sohio Petroleum Company, The Oil Shale Corporation and The Cleveland-Cliffs Iron Company.

You are further notified that you have until the last day of March, 1970, to file with the water clerk a verified statement of opposition to any such applications, if you desire to oppose any such applications.

By order of the Court entered January 15, 1970.

KAY PHILLIPS,
Water Clerk for Water Division No. 5,
Third Floor, Garfield County Courthouse,
Glenwood Springs, Colorado.

Published between February 4 and 6th.

Clerk's Office, Supreme Court, State of Colorado, Denver 80203

Case No. 24821

UNITED STATES OF AMERICA

v.

DISTRICT COURT, ETC. ET AL.

July 9, 1970.

Copy of an order entered in the above numbered and titled case July 9, 1970, is enclosed.

Yours very truly,

RICHARD D. TURELLI,
Clerk.

By MARY F. SPARK,
Deputy.

cc:

Mr. James L. Treece, United States Attorney, U.S. Court House, Denver, Colorado.
Mr. Shiro Kashiwa, Assistant Attorney General, U.S. Court House, Denver, Colorado.
Mr. Edmund B. Clark, Assistant Chief, Appellate Section, U.S. Court House, Denver, Colorado.
Mr. Leonard W. D. Campbell, Assistant United States Attorney, U.S. Court House, Denver, Colorado.
Mr. Robert H. Whaley, Attorney, Dept. of Justice, Washington, D.C.
Mr. Kenneth Balcomb, 829 Grand Ave., Glenwood Springs, Colo.
Mr. Alvin L. Steinmark, P.O. Box 749, Greeley, Colo.
Mr. John L. Kane, Jr., 1401 Saulsbury, Lakewood, Colo. 80215.

In the Supreme Court of the State of Colorado

THE UNITED STATES OF AMERICA, 24821

vs.

THE DISTRICT COURT IN AND FOR WATER DIVISION NO. 5, STATE OF COLORADO AND THE JUDGE THEREOF, THE HONORABLE CLIFFORD H. DARROW, AND THE WATER REFEREE THEREOF

Application for Writ in the Nature of Prohibition, Thursday, July 9, 1970

ORIGINAL PROCEEDING

Upon consideration of the application of the United States of America for writ in the nature of prohibition, together with the pleadings filed, it is this day ordered that said application be, and hereby is, denied.

By the Court, en banc, July 9, 1970.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 812

UNITED STATES, PETITIONER

v.

THE DISTRICT COURT IN AND FOR WATER DIVISION No. 5, STATE OF COLORADO, ET AL.

Order Allowing Certiorari. Filed December 7, 1970

The petition herein for a writ of certiorari to the Supreme Court of the State of Colorado is granted and the case is set for oral argument immediately following No. 87.

U.S. GOVERNMENT PRINTING OFFICE: 1971